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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

PETITION FOR REHEARING.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the petitioner, The Dickinson Industrial Site, Inc., a corporation, and presents this, its petition for a rehearing of the above entitled case, and in support thereof respectfully shows:

This Court granted certiorari to resolve a conflict between the decision of the Circuit Court of Appeals for the Second Circuit in *London* v. *O'Dougherty*, 102 F. (2d) 524, and the decision in this case by the Circuit Court of Appeals for the Seventh Circuit. In the *London* case it was held that appeals from compensation orders involving $500 or more may be taken as of right under the

Chandler Act. In this case it was held that appeals from these orders may be taken only upon allowance by the appellate courts, and this Court has affirmed, basing its decision upon the following conclusions:

1. Section 250 provides that the manner of appeal from compensation orders shall be by allowance of the circuit court of appeals.

   a. The addition of the words "and allowed by" in Section 250 would otherwise be meaningless.

   b. Section 24 can be held to govern the manner of appeal from compensation orders only if the word "taken to and allowed by" in Section 250 are construed "taken to *or* allowed by" the circuit court of appeals.

   c. The words "taken to" as used in Section 250 were construed in *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, to mean "allowed by".

2. Apart from Section 24, the circuit courts of appeals are invested by Section 250 with appellate jurisdiction to allow appeals from compensation orders. Because of the controversies regarding a revision of Section 24, Section 250 was intentionally isolated from Section 24.

3. Section 24 retains the distinction existing under former Section 24 as to appeals of right and appeals by leave of the appellate courts.

4. Sound policy would seem to require fiduciaries to make out a *prima facie* case of inequitable treatment in order to be heard before the circuit court of appeals.

Petitioner respectfully submits that the foregoing conclusions are unsound and that, upon a reconsideration of the case, the Court will adopt the construction of the Chandler Act by the Circuit Court of Appeals for the Second Circuit in the *London* case.

Before proceeding with the argument, in the course of which these conclusions will be examined, petitioner desires to point out:

First. The principle is well settled that when the language of a statute is unambiguous resort to extraneous aid in its interpretation is not permissible (*Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 449; *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 278).

Relying upon this principle, petitioner made no examination of the Congressional Records. No argument based upon the Congressional Records was presented to this Court by either petitioner or respondents. This Court apparently decided that the language of Section 250 was ambiguous and made its own examination of the Congressional Records, unassisted by counsel in this case.

Second. Clearly, the words "taken to and allowed by" in Section 250 cannot mean "taken to *or* allowed by". Respondents' argument against the construction urged by petitioner contained no such suggestion. It never occurred to counsel in this case that these words in Section 250 were susceptible of this construction. This issue was injected into the case for the first time by this Court at the close of the oral argument for petitioner. At that time counsel for petitioner denied that Section 250 must be construed "taken to *or* allowed by" in order to hold that the manner of appeal from compensation orders is governed by Section 24. It is apparent that the Court did not have the benefit of having this issue fully argued by counsel in the case.

I.

SECTION 250 BY ITS TERMS INCORPORATES SECTION 24 AS TO THE MANNER OF APPEAL.

Section 24 provides that review in all cases shall be by appeal, to be taken as of right when $500 or more is involved and "only upon allowance of appellate court" when less than $500 is involved. By this section, the

manner of appeal is made to depend upon the amount involved.

Section 25 provides for the time within which "appeals" may be taken.

Section 250 declares that "appeals may be taken * * * and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals". The other provisions of Section 250 regulate the procedure in the circuit court of appeals *after* the appeal has been perfected.

Since the form of review is in all cases by appeal, the "manner of appeal" in Section 250 can refer only to the method by which the appeal is to be taken. The method of taking the appeals is provided for by Section 24.

The expression "appeals * * * may * * * be taken to and allowed by the circuit court of appeals" is merely stating elliptically that "appeals may be taken to the circuit court of appeals and may be allowed by the circuit court of appeals".

The plain sense of the language of Section 250 is that "appeals may be taken to the circuit court of appeals *and* may be allowed by the circuit court of appeals in the manner provided for appeals by Section 24 of this Act, to-wit: When $500 or more is involved the appeal shall be taken as of right *and* when less than $500 is involved the appeal shall be taken only upon allowance of the appellate court". Then, as though to emphasize the right to an appeal, the words "may be taken" are repeated.

Such is the natural, logical, and grammatical construction of these sections of the Chandler Act.

a. *The construction contended for by petitioner does not render meaningless the words "and allowed by" in Section 250.*

1. If these words had been omitted, then the argument might be made (paralleling respondents' argument in this Court) that Section 250 authorizes appeals from all compensation orders to be taken as of right.

2. The clause "in the manner * * * provided for appeals by this Act" modifies "taken to and allowed by the circuit court of appeals". Appeals are not to be taken as of right to the circuit court of appeals "in the manner * * * provided for appeals by this Act". Appeals are not to be taken upon allowance by the circuit court of appeals "in the manner * * * provided for appeals by this Act". But they are to be "taken to and allowed by the circuit court of appeals" in the manner provided for appeals by the Act.

3. The history of Section 24 and Section 250 in the House clearly shows that it was the intent of Section 250 to incorporate Section 24 as to the manner of appeal, and, in fact, Section 250 so declared. The history of these sections, and related Sections 102 and 121, are contained in an Appendix. However, it should be stated here: Under Section 24 of H. R. 6439 (reintroduced as H. R. 8046) appeals from compensation orders were required to be allowed by the appellate courts, but it was further provided that "where, within the time limited for taking appeals, an appeal has been taken as of right instead of by allowance of the appellate court, the appellate court may in its discretion allow such appeal at any time before final determination with the same effect as if it had been duly allowed when taken". To cover this contingency, it was provided by Section 12 II d (7) (Section 250 as passed by the House) that appeals might be "taken to and alllowed by the circuit court of appeals"—"in the manner and within the time provided for appeals by this Act". In this connection, it should be noted that the words in Section 250 "taken to and allowed

by" the appellate court are not synonymous with the words "taken by allowance of the appellate court" used in Section 24. This conclusion is reinforced by the construction of the language of Sections 24, 102, 121, and 250 (derived from Sections 24, 77B(k), 77B(o), and 77B(c) (9) respectively) by this Court.[1]

b. When the words "taken to and allowed by" in Section 250 are given their natural, logical, and grammatical meaning, it must be held that Section 24 governs the manner of appeal from compensation orders. These words cannot be construed (1) to mean "taken to or allowed by", or (2) to mean "taken upon allowance by".

The Court states that to hold that the manner of appeal from compensation orders is governed by Section 24, it is necessary to construe the words "taken to and allowed by" to mean "taken to *or* allowed by". Obviously, these words cannot be so construed, and there is no necessity for such construction.

The Court further states that to hold that the manner of appeal from compensation orders is governed by Section 24 is to render meaningless the words "and allowed by" in Section 250. As hereinbefore pointed out, this is not true. In its present opinion, the Court construes these words not as "taken to and allowed by" but as "taken upon allowance by". This construction renders inoperative and meaningless the words "in the manner • • • provided for appeals by this Act" in the same section.

1. This Court held that Section 77B(k) made Sections 24 and 25 applicable to proceedings under Section 77B and that appeals from compensation orders were authorized to be taken only in the manner provided for appeals by those sections. See *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172; *O'Connor* v. *Mills*, 300 U. S. 26; *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160. The decisions of the lower federal courts were to the same effect: *Dee* v. *United Exchange Building*, 88 F. (2d) 372; *In Re Wilson-Sheridan Hotel Co.*, 86 F. (2d) 98; *In Re New York Investors*, 79 F. (2d) 179; *In Re Grocery Center*, 91 F. (2d) 76. These cases were cited in the Brief for Petitioner, at pages 15 and 25.

1. The words "taken to and allowed by" in Section 250 cannot be construed to mean "taken to or allowed by".

(a) Such construction is not logical.

(1) Section 250 declares that appeals may be taken to "the circuit court of appeals". The quoted words designate the court to which the appeal may be taken. The inappropriateness of the use of "or" here is obvious.

(2) An appeal cannot be taken to the circuit court of appeals until the appeal has been allowed or otherwise taken in the bankruptcy court. Otherwise, there is no "appeal" which can be "taken to" the circuit court of appeals and "allowed by" it. If the intent was to make appeals from compensation orders only by leave of the circuit court of appeals, this intent would have been expressed by the words "taken by allowance of" the circuit court of appeals, (Section 24 of the House Bill H. R. 6439 (H. R. 8046)), or "taken only upon allowance by" the circuit court of appeals (present Section 24). The history of Section 24 in the House Committee clearly shows that the committee was thoroughly familiar with the distinction between appeals "taken as of right" and appeals "taken by allowance of the appellate court". (See Opinion, Footnote 3; and H. R. hearings on H. R. 6439 (H. R. 8046) 75th Con. 1st Sess. pp. 78-80, 214-218, 223-224, 240-241, 405-406.)

(b) Such construction is not grammatical.

The use of the word "or" implies an alternative. To be taken "in the manner" provided for appeals by Section 24, appeals must be taken as of right when the amount involved is $500, or over, *and* upon allowance by the appellate court when the amount involved is less than $500. No alternative is given the person proposing to appeal.

2. The words "taken to and allowed by" cannot be construed "taken upon allowance by" the circuit court of appeals.

(a) *The words "taken to and allowed by" are not synonymous with "taken by allowance of", and were not so used in Section 250.*

Compare Section 24. This subject has previously been covered.

(b) *Such construction renders the words "in the manner * * * provided for appeals by this Act" inoperative and meaningless.*

If the words "taken to and allowed by" in Section 250 are construed to mean "taken upon allowance by" then it is clear that the words "in the manner * * * provided for appeals by this Act" in that Section are rendered inoperative and meaningless. If the words "taken to and allowed by" in Section 250 describe the manner of appeal from compensation orders, then it was needless to provide that "the manner" of appeal should be "in the manner * * * provided for appeals by this Act". This would be mere repetition. Such could not have been the intention. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word in the statute.

In *Early* v. *Doe*, 16 How. 610, this Court said at page 617:

> "Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning."

An again in *Market Co.* v. *Hoffman*, 101 U. S. 112, this Court said at page 115:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word."

Petitioner's argument on this point appears in the Brief for Petitioner at pages 22-25.

c. *The Court failed to consider and give effect to the words "may be taken * * *, and" in Section 250.*

The House revision of Section 24 retained the distinction between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy (Opinion, footnote 3). Section 250 expanded Section 77B (c) (9) to enlarge the scope of review upon appeal from compensation orders to cover a review of the facts as well as the law, and to provide for a hearing upon the original papers (Opinion, footnote 3).

When the House Bill reached the Senate, Section 24 was completely revised. The present Section 24 was substituted for the revision of that Section by the House. By Section 24 the amount involved was established as the test for determining the manner of appeal. Section 250, as passed by the House, was also revised by inserting the words which appear in bold face:

> "Appeals **may be taken** in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, **and** may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

An explanation of the insertion of these words may possibly be found in the suggestion made by Professor John Gerdes before the Senate Committee[2]:

> "The purpose of these two suggestions is to make it clear that we are actually increasing the jurisdiction of the appellate court. At the present time the appellate court cannot review, as to questions of fact, orders of the type covered by this Section. This language makes it clear that additional jurisdiction is being conferred."

This suggestion is significant. It shows clearly the rela-

2. S. Hearings on H. R. 8046, 75th Cong., 2nd Sess., p. 81.

tionship between Section 24 and Section 250. It shows that to authorize the circuit courts of appeals to review compensation orders *on the facts*, a jurisdiction not conferred upon them by Section 24, it would be necessary in Section 250 to add to the jurisdiction conferred by Section 24. More important still it shows:

1. Section 24 was intended to confer complete appellate jurisdiction on the circuit courts of appeals when the Bill, H. R. 8046, passed the House.

2. Section 250 did not confer jurisdiction on the circuit courts of appeals to review compensation orders on the facts, and if review on the facts was desired, it would be necessary in Section 250 to add to the jurisdiction conferred upon the circuit courts of appeals by Section 24.

3. The failure of Section 24 to confer this jurisdiction escaped notice in the House.

4. The words "may be taken" would cure this defect, the words "and allowed by" having no bearing on the question of jurisdiction.

(5) It was not the intent of a Bill, H. R. 8046, as it passed the House, to set Section 250 apart from Section 24.

It does not appear anywhere in the Congressional Records when this change in Section 250 was made. As revised, Section 24 conferred appellate jurisdiction "both in matters of law and in matters of fact" upon the circuit courts of appeals. If these words were inserted in Section 250 before the revision of Section 24, their only purpose was to add to the jurisdiction conferred upon the circuit courts of appeals by Section 24 authority to review compensation orders on the facts. Upon the revision of Section 24, these words were no longer necessary for the purpose for which they were employed, and probably were retained because not inconsistent with Section 24. If the

words were inserted in Section 250 after the revision of Section 24, their only purpose would be to emphasize the right to an appeal in all cases where the amount involved was $500 or over. In any event, the words have no bearing upon the construction of the other words in the section.

The Congressional Records affording no aid in the interpretation of the words "may be taken", Section 250 must be construed with these words in it (*Early* v. *Doe*, 16 How. 610; *Market Co.* v. *Hoffman*, 101 U. S. 112). Therefore, quite independently of a consideration of the words "and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals", Section 250 permits appeals to be taken in the manner provided for by appeals by Section 24.

d. *The words "taken to" in Section 77B (c) (9), from which Section 250 is derived, were not construed in Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, *to mean "allowed by".*

Section 77B (c) (9) provided that appeals from compensation orders "may be taken to the Circuit Court of Appeals". Section 77B (k), after making certain exceptions not material here, provided that:

> "All other provisions of this Act, except such as are inconsistent with this Section 77B, shall apply to proceedings instituted under this Section, whether or not an order to liquidate the estate has been entered."

In the *Shulman* case the words "taken to" were not construed to mean "allowed by." What this Court decided in that case was that by virtue of Section 77B (k), Sections 24 and 25 were made applicable to proceedings under 77B, and appeals from compensation orders were, therefore, authorized to be taken only as provision therefore had been made by Section 24.[3]

3. Brief for Petitioner, p. 15 and p. 25. Cases cited footnote 1, *supra*.

Section 102, derived from Section 77B (k), provides in part as follows:

> "SEC. 102. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivision h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive."

Section 121, derived from Section 77B (o), is as follows:

> "Where not inconsistent with the provisions of this chapter, jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding."

In the *Shulman* case this Court held it was not inconsistent with Section 77B (c) (9) to require appeals to be taken in the manner provided by Section 24. These Sections of Chapter X, being substantially a re-enactment of the provisions of Section 77B, should receive the same construction.

II.

SECTION 250 DOES NOT CONFER UPON THE CIRCUIT COURTS OF APPEALS JURISDICTION TO ALLOW APPEALS.

The Court holds in its present opinion that Section 250 *restricts* appeals. Admittedly Section 24 does not authorize the circuit courts of appeals to allow appeals from orders where the amount involved in the order is $500 or more. If Section 250 is to stand alone, as the Court apparently holds, it is not enough to say that Section 250 restricts appeals: it must be held that Section 250 confers complete jurisdiction upon the circuit courts of appeals to allow appeals. As appears from what has been hereinbefore stated, the words "and allowed by" were not in-

tended to confer appellate jurisdiction upon the circuit courts of appeals. It was not until the House Bill reached the Senate that the necessity of conferring jurisdiction upon the circuit court of appeals to review compensation orders upon the facts was observed. If Professor Gerdes' suggestion was adopted, it was the insertion of the words "may be taken" which was intended to confer additional jurisdiction and not the words "and allowed by". The Senate revision of Section 24 removed all doubt as to the appellate jurisdiction of the circuit courts of appeal to review compensation orders upon the facts as well as the law, as required by Section 250 as passed by the House.[3] This subject has already been covered in the preceding point. The present construction overturns the prior construction by this Court of the same language now embodied in Sections 102 and 250.[4]

III.

SECTION 24 ABOLISHES THE DISTINCTION EXISTING UNDER FORMER SECTION 24 AS TO APPEALS AS OF RIGHT AND APPEALS BY LEAVE OF THE APPELLATE COURTS.

In its opinion, the Court states at page 5:

> "But it is perhaps significant that that report in commenting on § 24 stated not that it 'abolished' but that it 'practically abolished' the distinction between appeals as of right and appeals by leave of appellate courts."

Section 24 abolishes the distinction between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy. Neither the petitioner nor the respondents contended that Section 24 "abolished" the distinction between appeals as of right and appeals by leave

3. See article by Professor John Gerdes, CORPORATE REORGANIZATION: CHANGES EFFECTED BY CHAPTER X OF THE BANKRUPTCY ACT, 52 Harvard Law Review 1, 37-38 (November 1938).

4. See cases cited in footnote 1.

of the appellate courts. Clearly, this distinction is made by Section 24. The comment in the Senate Committee Report that the distinction between appeals as of right and appeals by leave of the appellate court is "practically abolished" is unquestionably correct. Review of an order which involves less than $500 is rarely sought. If the comment on Section 24 had stated, not that it "abolished", but that it "practically abolished", the distinction, with respect to appeals, between orders in "controversies arising in bankruptcy proceedings" and orders in "proceedings" in bankruptcy, then, in view of the fact that compensation orders are "proceedings" in bankruptcy and were reviewable under former Section 24(b) only in the discretion of the appellate court, there might exist some basis for the argument that this distinction was retained by Section 24 in relation to Section 25. The succeeding sentence in the comment makes it perfectly clear that this result was not intended. That sentence is: "Under it, appeals may be made as of right *in all cases* involving $500 or more". (Opinion, footnote 4.)[5]

If Section 250 is complete in itself, then there is no necessity for this Court to refer to Section 24 in construing Section 250. If there is hidden in Section 24 the old distinction, in respect of appeals, between "controversies

5. Section 23b preserves the distinction between plenary proceedings and summary proceedings in the bankruptcy courts. Order 37 of the General Orders in Bankruptcy regulates the practice in plenary proceedings. The right to an interlocutory appeal in plenary proceedings is governed by general law applicable to the nature of the proceedings. See article by Professor John Gerdes, CORPORATE REORGANIZATIONS: CHANGES EFFECTED BY CHAPTER X OF THE BANKRUPTCY ACT, 52 Harvard Law Review 1 (November, 1938) p. 37, where the author states:

> "Except as to appeals from interlocutory orders, decrees or judgments, it is no longer necessary to make the often confusing distinction between 'controversies' in the proceedings and 'proceedings'. Interlocutory as well as final orders arising in any type of 'proceeding' are appealable, but apparently appeals in 'controversies' may be taken only from final orders. The facts may now be reviewed on appeals from all types of 'proceedings', as well as from 'controversies', with the exception that only matters of law may be reviewed when the appeal is from a judgment on a verdict rendered by a jury."

arising in bankruptcy proceedings" and "proceedings" in bankruptcy, then, instead of simplifying appeals, Section 24 adds to the confusion heretofore existing under that Section. Prior to the present opinion of this Court it seemed perfectly clear that appeals from compensation orders under the liquidation sections and the relief chapters (Chapters X-XIII) of the Act could be taken as a matter of right when more than $500 was involved.

Does the old distinction exist with respect to appeals from all compensation orders? And to appeals from what other orders will the old distinction apply?

IV.

THE POLICY OF CONGRESS, AS EXPRESSED IN SECTION 250, IS TO TIGHTEN CONTROL OVER FEE ALLOWANCES BY ENCOURAGING RATHER THAN DISCOURAGING APPELLATE REVIEW OF COMPENSATION ORDERS.

The Court states at page 6 of its opinion that:

> "it seems sound policy to require fiduciaries to make out a prima facie case of an equitable treatment in order to be heard before the appellate court."

Here the Court apparently overlooks the effect of its present decision. The Debtor is as much concerned with compensation allowances as are the fee claimants. It seems safe to assume that the sordid chapters in the history of fees in corporate reorganizations, to which the Court refers in its present opinion, involve cases where the fees allowed have been too large rather than too small. The present decision restricts the Debtor's right to appeal from compensation orders as well as the fee claimants'. This restriction on the right of appeal quite obviously makes for less, rather than more, effective control over fees. Under the Bankruptcy Act, the circuit courts of appeals are charged with the duty of control-

ling fee allowances and of correcting the abuses to which fee allowances are peculiarly subject. This control is exercised through appellate review. In furtherance of the policy of placing fees under more effective control, Congress, by the Chandler Act amendments, removed two obstacles which had theretofore hindered review of fee allowances. These were:

First. The limitation on the scope of review to matter of law only. Normally, this limitation restricted review to a single legal issue—abuse of discretion. Because of the difficulty of showing, as a matter of law, the existence of such abuse, appeals were ineffectual as a means of correcting fee allowances.

Second. Expense involved in the appeal. Appeals from compensation orders were heard in the same manner as appeals in other cases, upon a printed record and printed briefs.

Congress intended by Section 250 to facilitate appeals by permitting the circuit courts of appeals to dispose of appeals from compensation orders expeditiously and inexpensively by granting a summary hearing upon the original papers. In disposing of these appeals the circuit courts of appeals are required to exercise their own judgment based upon a review of the facts as well as the law. The policy of Congress, as expressed in Section 250, is to tighten control over fee allowances by encouraging rather than discouraging appellate review of compensation orders.

At pages 4-5 of its opinion the Court states:

> "There was not the slightest intimation of any dissatisfaction with the rule of *Shulman* v. *Wilson-Sheridan Hotel Co.*, *supra*, or with Sec. 250 as it was passed by the House."

The effect of the decision in the *Shulman* case was to limit the scope of review on appeals from compensation orders to matter of law only. Section 250, as it passed the

House (See also H. R. 6439), clearly indicates a dissatisfaction with this rule. Although compensation orders were not included by Section 24 in the type of orders which the circuit court of appeals was permitted to review upon the facts, the House intended by Section 250 to enlarge the scope of review on appeals from compensation orders to include a hearing upon either the facts or the law.

V.

THE OBJECT SOUGHT TO BE ACCOMPLISHED BY THE REVISION OF THE APPEAL PROVISIONS WAS TO SIMPLIFY AND MAKE UNIFORM APPEALS TO THE CIRCUIT COURTS OF APPEALS FROM ORDERS OF THE BANKRUPTCY COURTS.

It clearly appears from an examination of the Congressional Records that the purpose of the revision of Sections 24 and 25 was to simplify the appellate procedure and to do away with the confusion and injustice resulting from the distinction between appeals as of right and appeals by allowance of the appellate court based upon the unsatisfactory differentiation between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy. Nothing contained in Section 250 indicates an intention by Congress not to extend this policy to appeals from compesation orders under Section 250. The general policy expressed in Section 102 making, except where inconsistent with the provisions of Chapter X, the provisions of Chapters I to VII of the Act applicable to proceedings under Chapter X, and the fact that Section 250 is not only not inconsistent with the provisions of the revised Section 24 but actually follows the pattern of that Section with respect to "the manner" of appeal, indicate a clear congressional intent to conform Section 250 to the revised Section 24. There is

also the desirable objective of uniformity in procedure for the entire Act, and such uniformity should not be violated or sacrificed except where the context clearly compels a variance, or Congress has otherwise specifically provided.[6]

The record of the hearings on H. R. 6439 (H. R. 8046) plainly shows all persons concerned with the revision of the Bankruptcy Act believed that a revision of Sections 24 and 25 would govern the practice and procedure upon appeals from orders of the bankruptcy courts.

The House revision of Sections 24 and 25 was not satisfactory to the Bar, and at the May meeting of the American Bar Association, the Report of the Standing Committee on Commercial Law and Bankruptcy, disproving the House revision and recommending the adoption of the amendments presented by Mr. Ruben G. Hunt and by Mr. W. B. Henderson, was approved.[7] At the 1938 meeting of the American Bar Association, the Association reiterated its stand.[8]

In substance the only difference between the Henderson proposal and the Hunt proposal was that the Henderson proposal restricted the scope of review on appeals from certain types of orders to matters of law only, while the Hunt proposal authorized review in both matters of fact and matters of law.[9] Both proposals recommended (1) that the distinction between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy be abolished; (2) that appellate jurisdiction be restricted to appeals involving $500 or over; (3) that all appeals be permitted to be taken as of right; and (4) that

6. Brief for Petitioner, pp. 26-30.

7. Vol. 62, Reports of American Bar Association (1937) pp. 623-624, 631-632; H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong. 1st Sess. pp. 80, 213-4, 222-3. Mr. Hunt's suggested revision of Sections 24 and 25 was approved by the Los Angeles Credit Men's Association and the Los Angeles Wholesalers' Board of Trade. H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong. 1st Sess. pp. 405-406.

8. Vol. 63 Reports of American Bar Association (1938) pp. 234-235.

9. H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong. 1st Sess. pp. 217-8; cf: 223.

the new Rules of Civil Procedure relating to appeals be incorporated. Mr. Hunt stated that his proposals would accomplish, among others objects:[10]

> "1. Abolish the vexatious distinction between 'controversies arising in bankruptcy proceedings' and 'proceedings in bankruptcy proper.'
>
> 2. Abolish the troublesome situation where the appellate court must determine whether it has the power to consider questions of law only or can consider both questions of law and of fact.
>
> 3. Abolish the nuisance situation that now exists where a petition for appeal must be allowed by a special order of the lower court or the appellate court.
>
> 4. Abolish the present system in the form of certiorari proceedings where the appellate court has discretion to allow or refuse an appeal in certain classes of cases."

Mr. Henderson claimed that his proposal would accomplish the same object.[11]

Mr. Hunt argued that the 1926 amendments, which required permission of the appellate court for leave to appeal, had doubled the work of these courts by requiring them to pass twice upon the same points of law involved, and that the expense involved in appealing upon trivial and unimportant matters would be a sufficient deterrent to appeals of this kind.[12] When the scope of review was broadened to include a review of the facts and the law, the burden of requiring the appellate courts to pass twice upon the same matters is apparent.

The recommendation by the American Bar Association of the proposal of Mr. Hunt was adopted by the Senate, except that appeals involving less than $500.00 were authorized to be taken upon allowance by the appellate courts.

After the passage of the Chandler Act amendments, Mr. Jacob I. Weinstein and Professor John Gerdes, both

10. H. R. Hearings on H. R. 6439 (H. R. 8046), 75 Cong., 1st Sess. p. 218.

11. H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong., 1st Sess. p. 223.

12. H. R. Hearings on H. R. 6439 (H. R. 8046) 75th Cong. 1st Sess. 217.

of whom testified before the House and Senate Committees, agree that appeals in all cases from orders in proceedings under the Act are authorized to be taken as of right where the amount involved is $500 or over.[13]

13. Jacob I. Weinstein, THE BANKRUPTCY LAW OF 1938, where the author states at page 65-66:

"These baffling and confusing distinctions, which gave rise to many injustices and endless confusion, have been eliminated by the Chandler Act. All appeals to the circuit courts may now be taken as of right, except that an appeal from an order, decree or judgment involving less than $500 must still be allowed by the Circuit court, and all appeals now review both the law and the facts, except appeals from jury verdicts, which review the law only. The first named exception is designed to discourage appeals in relatively inconsequential matters, and the other exception recognizes and preserves the principle that the jury is the finder of the facts and that its fact findings, when supported by sufficient evidence, are final and conclusive. The applicability of these exceptions should present no problems.

The differentiation between "controversies arising in proceedings in bankruptcy" has been retained for only one purpose, namely, to allow appeals from interlocutory judgments, decrees or orders in the series of administrative steps which constitute the bankruptcy proceeding. Obviously, it would not be feasible or advisable in such cases, to postpone the right of appeal to the date of termination of the entire bankruptcy proceeding.

This subdivision [24b] has been derived, unchanged, from subd. b of sec. 24 of the old Act, which also provided that appeals thereunder, except the appeals enumerated in subd. a of sec. 25, shall be allowed only in the discretion of the appellate court. As hereinabove indicated, this provision has been deleted, but an exception, requiring allowance, has been made with respect to appeals from matters involving $500 or over."

and again at page 249 where the author discusses Section 250:

"This provision has been derived from clause (9) of subd. c of sec. 77B which has been expanded to make clear that the appeal from the grant or refusal of allowance of compensation shall be heard summarily and without the requirement of a printed record."

JOHN GERDES, CORPORATE REORGANIZATIONS: CHANGES EFFECTED BY CHAPTER X OF THE BANKRUPTCY ACT, 52 Harvard Law Review 1 (November, 1938), where the author states at page 37:

"Appeals in reorganization proceedings continue to be governed by the bankruptcy sections but these have been radically revised.

Except as to appeals from interlocutory orders, decrees or judgments, it is no longer necessary to make the often confusing distinction between 'controversies' in the proceedings and 'proceedings.' Interlocutory as well as final orders arising in any type of 'proceeding' are appealable, but apparently appeals in 'controversies' may be taken only from final orders. The facts may now be reviewed on appeals from all types of 'proceedings,' as well as from controversies,' with the exception that only matters of law may be reviewed when the appeal is from a judgment on a verdict rendered by a jury.

Allowance of the appellate court is no longer necessary to take an appeal from any kind of a 'proceeding' or 'controversy,' unless the order, decree, or judgment involves less than $500 in amount. The separate classification of certain types of 'proceedings' and the problem of determining whether a particular 'proceeding' fitted into one or the other of two categories, has been eliminated. Only the readily determinable question of amount affects the determination whether appellate allowance of the appeal is required."

All of these men were members of the National Bankruptcy Conference who took a large part in the revision of the bankruptcy Act. It was assumed by all concerned that upon the revision of Sections 24 and 25 the question of the practice and procedure upon appeals had been definitely settled.

For this reason, the Senate Committee, in its Report, after commenting upon the revision of Sections 24 and 25, found it unnecessary to make any further comment upon Section 250 than:

> "Section 250, derived from Section 77B (c) (9), is intended to facilitate appeals from the grant or refusal of an allowance of compensation. These are to be disposed of without the necessity of a printed record."

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the decree of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, reversed.

Respectfully submitted,

Walter A. Wade,
Benjamin Wham,
George W. Ott.
Attorneys for Petitioner.

Certificate.

We, Walter A. Wade, Benjamin Wham, and George W. Ott, hereby certify that we are attorneys and of counsel for The Dickinson Industrial Site, Inc., the petitioner in the above entitled case, and that the foregoing petition for rehearing is not presented for the purposes of delay, but is in our opinion well founded in law and proper to be filed herein.

Walter A. Wade,
Benjamin Wham,
George W. Ott.

APPENDIX.

A History of H. R. 6439 (H. R. 8046) Relating to Appeals

Before The House of Representatives.

APPENDIX.

The history of Section 24 and Section 250 in the House clearly shows that it was the intent of Section 250 to incorporate Section 24 as to "the manner" of appeal, and, in fact, Section 250 expressly so declared.

Related to Sections 24 and 250 are Sections 102 and 121, and historically they must be treated together. Section 24 is a complete revision of former Sections 24 and 25. Section 250 is derived from Section 77B(c)(9); Section 102 is derived from Section 77B(k); and Section 121 is derived from Section 77B(o). The Bill H. R. 6439, to amend and revise the bankruptcy act, was introduced in the House by Congressman Chandler on April 15, 1937. In this bill the so-called relief sections, now Chapters X to XIII, inclusive, appeared as subsections of Section 12, the old composition section. This Bill was reintroduced as H. R. 8046.

Toward the close of the hearings before the House Committee, Professor John Gerdes pointed out how cumbersome, confusing and illogical it was to place the provisions for relief in subsections under Section 12, and suggested that these subsections be made separate chapters and the paragraphs be broken up into small sections. This suggestion was adopted by the House Committee.

In the Bill, H. R. 6439, Section 24 retained the distinction between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy, both as to the method and scope of review, but added to the type of orders in "proceedings" in bankruptcy which could be taken as of right. However, it was further provided:

> "That where, within the time limited for taking appeals, an appeal has been taken as of right instead

of by allowance of the appellate court, the appellate court may in its discretion allow such appeal before any time before final determination with the same effect as if it had been duly allowed, when taken, by the appellate court, as the case may be."

In substantially this form, Section 24 was passed by the House (Opinion, Footnote 3). A clarifying amendment deleted the words "by the appellate court, as the case may be" at the end of the quoted provision and added: "and where, within the time limited for taking appeals, an appeal has been taken by allowance of the appellate court instead of as of right, the appellate court may in its discretion entertain and determine such appeal with the same effect as if it had been duly taken as of right."

In the Bill, H. R. 6439 (H. R. 8046) Section 12 II d. (7)[1] derived from Section 77B (c) (9)[2] was expanded (1) to

1. Section 12 II d (7) appeared in the following form:

"(7) The judge may, after hearing upon notice to all parties in interest, allow, whether or not the plan is confirmed, reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred (a) in the proceeding and in connection with the plan and the reorganization, by referees or special masters, trustees and other officers, appraisers, accountants, depositories, reorganization managers and committees, or other representatives of creditors or of stockholders, and any other parties in interest, and the counsel, attorneys or agents of any of the foregoing and of the debtor; and (b) where a petition under this subsection is filed in a pending bankruptcy proceeding, the judge shall, after hearing upon notice to all parties in interest, allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in such pending bankruptcy proceeding by referees, receivers, trustees and other officers, appraisers, accountants, and any other parties entitled to compensation in such proceeding, including counsel and attorneys for any of the foregoing and of the debtor, and such compensation shall not be limited by the provisions of sections 40 and 48 of this Act. Appeals in matter of law and fact from orders making or refusing to make any such allowances may, in the manner and within the time prescribed for appeals by this Act, be taken to and allowed by the circuit court of appeals for the circuit in which the proceeding under this subsection is pending, independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

2. Section 77B (c) (9) is as follows: "Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him . . . (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expense incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives

authorize compensation to be paid although no plan was confirmed, and (2) to broaden the scope of review on appeal from compensation orders to include a review of the facts as well as the law. The last sentence read:

> "Appeals in matters of law and fact from orders making or refusing to make any such allowances made, in the manner and within the time prescribed for appeals by this Act, be taken to and allowed by the circuit court of appeals for the circuit in which the proceeding in this sub-section is pending, independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

With some revisions, Section 12 II d.(7) was broken up and became Sections 241 to 250, inclusive.

Under Section 24, as passed by the House, appeals from compensation orders were required to be allowed by the appellate courts but it was further provided that "where, within the time limited for taking appeals, an appeal has been taken as of right instead of by allowance of the appellate court, the appellate court may in its discretion allow such appeal at any time before final determination with the same effect as if it had been duly allowed when taken". A thorough and painstaking examination of the hearings before the congressional committees on H. R. 6439 (H. R. 8046) fails to disclose any comment whatsoever upon the words "taken to and allowed by". It seems reasonable to assume, however, in view of the provision of Section 24, that these words were used to include appeals that had been erroneously taken to the appellate court "within the time limited for taking appeals". The language of Section 250 that appeals "may, in the manner and within the time provided for appeals by

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of creditors or stockholders, and the attorneys or agents of any of the foregoing and of the debtor, but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals independently of their appeals in the proceeding and shall be held summarily."

this Act, be taken to and allowed by circuit court of appeals", suggests this connection. This is further borne out by the fact that the words in Section 250 "taken to and allowed by" the appellate court are not synonymous with the words "taken by allowance of the appellate court" as used in Section 24. The House Committee was thoroughly familiar with the distinction between appeals "taken as of right" and "appeals by allowance of the appellate court".[3]

The dependence of Section 12 II d. (7) on Section 24 is further emphasized by the relationship of these sections in H. R. 6439 (H. R. 8046) to Section II f. (1) and Section 12 II a. (1).

Section 12 II f. (1),[4] derived from Section 77B (o),[5] provided that where not inconsistent with the provisions of subdivision II of Section 12, the jurisdiction of the appellate courts shall be the same as in bankruptcy proceedings. Section 12 II f.(1), with some revision, was broken

3. H. R. Hearings on H. R. 6439 (H. R. 8046) 75th Cong., 1st Sess., pp. 78-80, 214-218, 223-224, 240-241, 405-406.

4. Section 12 II f. (1) appeared in the following form:
"JURISDICTION, POWERS, DUTIES, RIGHTS, AND TITLE.—(1) In a proceeding under this subsection (a) the court in which the petition is filed shall have exclusive jurisdiction of the debtor and its property, wherever located, and (b) where not inconsistent with the provisions of this subsection, the jurisdiction, powers, and duties of the court, the title, powers, and duties of its officers, the rights, privileges, and duties of the debtor, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor, and the jurisdiction of appellate courts, shall, before the approval of the petitioner, be the same as in a bankruptcy proceeding before adjudication, and, upon the approval of the petition, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered, where a bankruptcy proceeding is pending, on the day when the voluntary or involuntary petition in bankruptcy was filed, otherwise on the day when the petition under this subsection was filed."

5. Section 77B(o) is as follows: "(o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."

up and became Sections 111, 112, 114 and 121. Section 121 of the present Act provides as follows:

> "Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding."

Section 12 II a. (1),[6] derived from Section 77B(k),[7] after making certain enumerated exceptions not material here, provided:

> "All other provisions of this Act, not inconsistent with the provisions of this subsection, shall apply in a proceeding under this subsection."

The language of sections 24, 102, 121, and 250 (derived from sections 24, 77B(k), 77B(o), and 77B(c), (9), respectively) had been construed in *Shulman* v. *Wilson-Sheri-*

6. Section 12 II a.(1) appeared as follows: "a. APPLICATION; DEFINITIONS.—(1) The provisions of this subsection shall apply exclusively to proceedings under this subsection. Unless and until an order is entered directing that bankruptcy be proceeded with, sections 22, 40, 44, 48, and 55, subdivisions a, b, d, e, h, i, and n of section 57, sections 58, 63, 64 and 65, and subdivisions b, f, g, h, and i of section 70 of this Act shall not apply in a proceeding under this subsection; all other provisions of this Act, not inconsistent with the provisions of this subsection, shall apply in a proceeding under this subsection."

7. Section 77B(k) is as follows: "(k) If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 22, who shall be compensated as provided in section 40; (2) the first meeting of creditors shall be held as provided in section 55, upon notice as provided in section 58; (3) a trustee or trustees shall be appoined as provided in section 44, and be compensated as provided in section 48; (4) claims which are provable under section 63 may be proved as provided in section 57, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 64; (6) sales shall be made as provided in subdivision (b) of section 70; (7) dividends may be declared and paid as provided in section 65. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 57, and subdivisions (a) and (e) of section 70, shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate. All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'; 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication."

dan Hotel Co., 301 U. S. 172; *O'Connor* v. *Mills*, 300 U. S. 26; *Meyer* v. *Kenmore Hotel Company*, 297 U. S. 160; *Ice* v. *United Exchange Building*, 88 F. (2d) 372; *In re Wilson-Sheridan Hotel Co.*, 86 F. (2d) 98; *In re New York Investors*, 79 F. (2d) 179; *In re Grocery Center*, 91 F. (2d) 76. In these cases it was held that sections 77B (k) made sections 24 and 25 applicable to proceedings under Section 77B and that appeals from orders in reorganization proceedings were authorized to be taken only as provided for by section 24.

In *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, this Court held it was not inconsistent with section 77B (c)(9) to require appeals to be taken in the manner provided by section 24. It must be assumed that the House in substantially re-enacting these provisions of section 77B intended that they would receive the same construction.

The House Committee Report that accompanied H. R. 6439 (H. R. 8046) made the following comments with respect to the provisions relating to appeals, at page 22:

> "(d) *Practice on appeals.*
>
> Sections 24 and 25: Sections 24 and 25 of the present act relate to appellate jurisdiction and should be considered together. Section 24 (a) confers such jurisdiction over 'controversies arising in bankruptcy proceedings', in both law and fact, if the proceeding is essentially equitable, and in law only as by a writ of error, if the proceeding is one at law. Section 25 (a) allows appeals 'as in equity cases, in bankruptcy proceedings' in the three instances specified. Section 24 (b), which restricts the review to matters of law only, is intended to include all other proceedings in bankruptcy. In both sections provision is made that all reviews therein provided shall be in the form of an appeal; the time is fixed for taking the appeal, and the reviews under section 24 (b) are allowable only in the discretion of the appellate court.
>
> The order of the provisions is illogical and confus-

ing. The bill has rewritten the sections by bringing under section 24 all the provisions dealing with appellate jurisdiction and under section 25 those dealing with practice on appeals.

Appeals as of right are extended to include the confirmation or refusal to confirm a plan of reorganization and an appeal from a turnover order.

Subdivision b of section 24 is expanded in order to overcome the existing hardships which result from the failure to take an appeal in proper form. The amendment provides that the appellate court may in its discretion permit an amendment of the appellate record either in the case of an appeal taken as of right where it should have been taken by allowance or by allowance when it should have been taken as of right.

The distinction between appeals as of right and by allowance and the distinction between controversies arising in a bankruptcy proceeding and proceedings in bankruptcy, upon which the former is predicated, are of necessity retained. To eliminate these distinctions would result in putting upon appellate courts the burden of hearing appeals from administrative steps in a proceeding, and what is much more objectionable the slowing up of the administration of an estate."

And the following comment in respect of Section 250, at page 46:

"Appeals may be taken on allowances made or on refusal to make allowances. Such appeals may be independently taken and shall be summarily heard upon the original papers."

SUPREME COURT OF THE UNITED STATES.

No. 386.—October Term, 1939.

The Dickinson Industrial Site, Inc., a Corporation, formerly The Albert Dickinson Company, Petitioner, *vs.* Percy Cowan, Edgar N. Greenebaum, Walter A. Wade, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March 11, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

A plan of reorganization of petitioner under § 77B of the Bankruptcy Act (48 Stat. 912) was confirmed on February 23, 1938. Respondents are members of a bondholders' committee who sought an allowance in those proceedings. On October 26, 1938, they were awarded $2,000 for services rendered, $20,000 having been asked. On November 25, 1938, they petitioned the Circuit Court of Appeals for leave to appeal from that order. The appeal was allowed. Petitioner moved to dismiss the appeal on the ground that the Court of Appeals had no jurisdiction to allow it, the argument being that respondent had an appeal as of right which could only be taken by filing a notice of appeal in the District Court. The Circuit Court of Appeals denied petitioner's motion to dismiss and modified the order by increasing the allowance to $10,000. 104 F. (2d) 771. We granted certiorari because of a conflict of that ruling with *London* v. *O'Dougherty*, 102 F. (2d) 524, which held that appeals from compensation orders involving $500 or more could be had as a matter of right under the Chandler Act (52 Stat. 840).

First. The Circuit Court of Appeals held that the provisions of the Chandler Act, which became effective on September 22, 1938 (§ 7), were applicable to this appeal. We think that follows from § 6(b) of the Act which states that "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect; . . ." Where, as here, appeal is taken after the

effective date of the Act, it is clearly "practicable" to apply the new appeal provisions. Contrary to respondents' contention, § 276(e)(2) is not applicable to appeals. It provides that the provisions of Ch. X (the successor to § 77B) shall apply to pending proceedings "to the extent that the judge shall deem their application practicable" where the petition in such proceedings was approved more than three months before the effective date of the amendatory Act. But that relates solely to proceedings in the district court. The "judge" referred to in that section means a "judge of a court of bankruptcy". § 1(20). Such court does not include the Circuit Court of Appeals. § 1(10). Hence the application of the new appeal provisions to this type of case is not dependent on a determination of practicability by the district judge under § 276(c)(2).

Second. Petitioner's argument that the appeal in this case could be taken as a matter of right requires an analysis of § 24 and § 250 of the Chandler Act. Sec. 24 provides in part:

"a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Sec. 250 provides:

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Petitioner contends that Congress by § 24 created a single test—the amount of the order appealed from—for determining whether leave to appeal was necessary and that the words "allowed by" in § 250 refer to appeals from orders of allowances of less than $500.

Our view, however, is that appeals from all orders making or refusing to make allowances of compensation or reimbursement under Ch. X of the Chandler Act may be had only at the discretion of the Circuit Court of Appeals.

Under § 77B(c)(9) it was provided that "appeals from orders fixing such allowances may be *taken to* the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily." And it was held by this Court in *Shulman v. Wilson-Sheridan Hotel Co.*, 301 U. S. 172, that those appeals could not be had as a matter of right but only in the discretion of the appellate court as provided in former § 24(b). That was the way the matter stood when § 250 was drafted. The history of that section[1] shows that it was derived from § 77B(c)(9). But, significantly, the words "*and allowed by*" were added—words not present in § 77B(c)(9). The result plainly was (1) to carry over into the new act the rule of *Shulman v. Wilson-Sheridan Hotel Co., supra,* and (2) to set apart in a separate section the provisions for appeals from that type of order so as to make those appeals no longer dependent on § 24, which had become a storm center for the revisionists.[2] If the House did not intend the latter result, then the addition of the words "and allowed by" were wholly needless, as under the House revision of § 24 appeals from compensation orders would have been discretionary with the appellate court.[3]

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[1] S. Rep. No. 1916, 75th Cong., 3rd Sess., p. 38.

[2] H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong., 1st Sess., pp. 79-80, 213-218, 222-223, 240-241, 405-406; S. Hearings on H. R. 8046, 75th Cong., 2nd Sess., pp. 53-54, 60, 103-108. And see H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 22.

[3] This is made clear by comparison of § 250 with § 24 as they passed the House.

Sec. 250 then read:

"Appeals in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Sec. 24 a and b then read:

"a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals of the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions (1) of controversies arising in the course of proceedings under this Act in the same manner and to the same extent as in suits at law or in equity; (2) to superintend and revise, in matter of law and fact, the proceedings of such inferior courts of bankruptcy in the following

Hence under the House Bill as it reached the Senate, it seems clear that no such appeals could be had as a matter of right. In the Senate the present § 24 was substituted for the House provision; but the present § 250 was not altered in any respect material here. It is clear from the Senate hearings and Commitee Report that the Senate was interested only in the elimination from § 24 of the old distinctions between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy. There was not the slightest intimation of any dissatisfaction with the rule of *Shulman* v. *Wilson-Sheridan Hotel Co., supra,* or with § 250 as it

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cases: (a) A judgment adjudging or refusing to adjudge a person a bankrupt; (b) a judgment approving or dismissing a petition filed by or against a debtor under chapter X of this Act; (c) a judgment granting or denying a discharge; (d) a judgment confirming or refusing to confirm an arrangement or plan; (e) a judgment allowing or rejecting a debt, claim, or interest of $500 or over; and (f) a judgment allowing or dismissing an application for an order upon a bankrupt or other person to deliver or turn over property to the marshal, or to the receiver or trustee of the estate; and (3) to superintend and revise, in matter of law only, the proceedings in all other cases of such inferior courts of bankruptcy.

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal: *Provided,* That in the cases specified in subdivision a (3) of this section, such appeals shall be allowed in the discretion of the appellate court: *And provided further,* That where, within the time limited for taking appeals, an appeal has been taken as of right instead of by allowance of the appellate court, the appellate court may in its discretion allow such appeal at any time before final determination with the same effect as if it had been duly allowed, when taken, and where, within the time limited for taking appeals, an appeal has been taken by allowance of the appellate court instead of as of right, the appellate court may in its discretion entertain and determine such appeal with the same effect as if it had been duly taken as of right."

S. Rep., *supra* note 1, p. 4, commented as follows on the present § 24:

"The House bill makes certain amendments in the sections of the act (24-25) relative to appeals, but preserves the existing distinction between appeals as of right and appeals by leave of the appellate courts. The amendment presented by the committee practically abolishes this distinction. Under it, appeals may be made as of right in all cases involving $500 or more. In controversies of less than this amount, appeals may be taken only upon allowance by the appellate court. The jurisdiction of the appellate court will extend both to matters of law and of fact, except that in an appeal from a judgment on a verdict rendered by a jury the jurisdiction will extend to matters of law only. The removal of the troublesome distinction will be a service to both bench and bar. It is often difficult to determine the proper procedure under the present law and frequently appeals are taken in both ways in order to be certain. The House bill seeks to remedy this condition by providing that in the event of mistake the appellate court may consider the appeal as properly taken and proceed to a determination of the case. Your committee believes it is much better to eliminate the distinction altogether."

The testimony of Reuben G. Hunt before the Senate Committee is particularly illuminating on this point of controversy. S. Hearings, *supra,* note 2, p. 53. See also Hunt, Appeals from the District Courts to the Circuit Courts of Appeals in Bankruptcy Cases, 42 Comm. L. Journ. (1937).

passed the House. To be sure, the Senate Committee Report is somewhat ambiguous.[5] But it is perhaps significant that that report in commenting on § 24 stated not that it "abolished" but that it "practically abolished" the distinction between appeals as of right and appeals by leave of the appellate courts.

More important, however, is the matter of statutory construction. To hold that an appeal from a compensation order is governed by § 24 the words "taken to *and* allowed by" in § 250 must be read "taken to *or* allowed by". Only then can appeals from compensation orders involving less than $500 be governed by "allowed by" and appeals from all other such orders be governed by "taken to". In the face of the foregoing history we do not believe we are justified in substituting "or" for "and". The inappropriateness of it is somewhat emphasized by the history of *"taken to"* which in *Shulman* v. *Wilson-Sheridan Hotel Co., supra,* was held not to permit an appeal as of right. It is further emphasized by considerations of policy.

The history of fees in corporate reorganizations contains many sordid chapters. One of the purposes of § 77B was to place those fees under more effective control.[6] Buttressing that control was § 77B(c)(9) which, together with former § 24(b), made appeals from compensation orders discretionary with the appellate court. We should not depart from that policy in absence of a clear expression from Congress of its desire for a change. Fee claimants are either officers of the court or fiduciaries,[7] such as members of committees, whose claims for allowance from the estate are based only on service rendered to and benefits received by the estate.[8] Allowance or disallowance involves an exercise of sound discretion

[5] That report states that the present § 24 "practically abolishes" the distinction "between appeals as of right and appeals by leave of the appellate courts." *Id., supra,* note 4. And the Committee in commenting on § 250 merely says:

"Section 250, derived from section 77B(c)(9), is intended to facilitate appeals from the grant or refusal of an allowance of compensation. These are to be disposed of without the necessity of a printed record." *Id.,* p. 38.

[6] H. R. Rep No. 194, 73rd Cong., 1st Sess., p. 1.

[7] The fiduciary status of such claimants is expressly recognized in the Chandler Act. Sec. 249 provides in part:

"No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred."

[8] Sec. 243.

by the court based on that statutory standard. Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law — abuse of discretion. These factors not only emphasize the appropriateness of the separate treatment by Congress of appeals from compensation orders; they reinforce the interpretation of § 250 which restricts these appeals. For certainly it seems sound policy to require fiduciaries to make out a *prima facie* case of inequitable treatment in order to be heard before the appellate court. To allow these appeals as a matter of right is to encourage an unseemly parade to the appellate courts and to add to the time and expense of administration. We will not resolve any ambiguities in favor of that alternative.

Whether or not the Circuit Court of Appeals erred in modifying the order so as to grant respondents an increased allowance was not raised in the petition for certiorari and hence has not been considered here. *Helis* v. *Ward*, 308 U. S. 365.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.